

Site Remediation Reform and Licensed Site Professional Bill Summary

The Department of Environmental Protection has determined that an excessive backlog of contaminated sites, the current process used to review remediation documents and the lack of aggressiveness on the part of some dischargers has inhibited its ability to ensure timely remediation of contaminated sites in New Jersey. In order to ensure that the Department can protect human health and the environment from the threats posed by hazardous discharges at contaminated sites, spur redevelopment, and reduce the number of contaminated sites being warehoused in New Jersey, significant reform is needed to the site remediation process. In order to ensure these reforms are implemented, the proposed bill includes statutory amendments which:

1. Mandate how the Department of Environmental Protection (DEP) shall provide remediation oversight,
2. Further support the existing statutory incentives for unrestricted use cleanups,
3. Provide disincentives for warehousing of contaminated sites,
4. Provide disincentives for cleanups to restricted standards or using caps,
5. License environmental consultants who perform site remediation work,
6. Clarify a responsible party's obligation under the Spill Act to clean up and remove a discharge,
7. Modify Remediation Funding Source requirements, and
8. Amend various site remediation statutes in order to implement the above amendments.

This proposed bill specifically establishes a new licensing board that will be authorized to license environmental consultants who perform work on site remediation cases. The board will be comprised of 11 individuals, 4 of which are Licensed Site Professionals (LSPs), 6 other individuals with knowledge of site remediation issues, and the Commissioner of the DEP or a designee. The board will be required to develop rules related to licensing as well as the enforcement of its licenses, including the ability to issue penalties, suspend and revoke licenses.

Licensed Site Professionals will be required to adhere to a strict Code of Conduct, Ethics and Conflict of Interest. They will be required to certify that all submittals to the DEP comply with State statutes and rules, and they will issue Response Action Outcomes (RAOs) which certify that a site has been remediated pursuant to all applicable laws and regulations. As a result of the LSPs issuing RAOs, the DEP will no longer issue No Further Action (NFA) letters, except for certain cases.

The DEP will change how it oversees cases by establishing an initial screening process for all documents submitted by an LSP. All documents will be screened by the DEP. All screenings will include an evaluation of specific triggers enumerated in this proposed bill and based on this evaluation, the DEP will either accept the document as is, perform some level of audit, or assign a full time case manager to oversee the remediation at the site. LSPs will continue their work unless otherwise directed by DEP. The DEP will notify an LSP within 6 months of receipt of an RAO of its intent to audit an RAO and

will provide a timeframe for completion of the audit. The DEP will have the ability to invalidate an RAO if the remedial action is not protective of human health, safety and the environment. Issuance of an RAO will not impact the DEP's ability to pursue compensation for natural resource damages.

The DEP will also provide expanded oversight for a series of cases that represent the highest priority cases, either because the sites impacts sensitive ecological receptors or because the person conducting the remediation has a history of noncompliance as evidenced by missing mandatory deadlines or being subject to repeat enforcement action. The Department's oversight of these cases includes its ability to require an RFS in the form of a Remediation Trust Fund for the entire cost of the remediation and the DEP will make disbursements from this Fund to pay the LSP for conducting the remediation. The DEP will also have remedy selection authority for these cases and will ensure that the level of public participation is commensurate with the importance of the case. Additionally, an LSP working on these cases must submit all documents, data, and reports simultaneously to the client and DEP.

This bill also modifies existing statutes with regard to who is required to establish a Remediation Funding Source (RFS). This bill exempts small businesses, homeowners, governmental agencies, educational facilities and childcare facilities. It clarifies that all persons conducting remediation who are Spill Act liable parties must establish an RFS once the cost of constructing the remedial action is determined in a Remedial Action Work Plan and the RFS shall be for this cost. Current law requires an RFS to be established earlier in the process and for the full cost of the remediation. Current law also requires an annual 1% surcharge on all RFSs and this money is placed in the Hazardous Discharge Site Remediation Fund. This bill continues the practice of charging a 1% annual surcharge but remits this money to the Remediation Guarantee Fund (RGF) to be used as outlined below. This bill also modifies a party's ability to self-guarantee the full amount of an RFS. It allows for self-guarantees but limits a self-guarantee to 50% of an RFS and charges a 1% annual surcharge on the portion of the RFS that is not a self-guarantee.

The annual surcharge money shall be deposited into the RGF (which exists under current law) and would be used to provide grants to homeowners, homeowner associations and subsequent purchasers when a remedy fails or an order of magnitude standard change under two circumstances: 1. There is no viable RP; or 2. The original RP cleaned up by implementing an unrestricted use or limited restricted use (no cap) remedial action. The DEP believes this fund is needed to protect homeowners, homeowners associations and subsequent purchasers from having to pay for remedy failure or order of magnitude changes when a limited liability corporation or discharger dissolves, goes bankrupt, ceases to be viable. Also the ability of a discharger to "walk away" once they have remediated a site using an unrestricted use or limited restricted use remedial action will provide "finality" that many parties have been asking for.

The bill includes a one time 5% premium for all entities that cleanup using a restricted use remedial action (employs the use of an engineering control, typically a cap). This money would also go into the RGF for the same uses noted above. The DEP believes the 5% premium may act to further reinforce the existing statutory preference for permanence in the Brownfield act, by serving as a disincentive for restricted use cleanups when the cost differential between remediating to a limited restricted use or unrestricted use is not huge, especially coupled with the finality noted above. Exemptions for the 5 % premium are proposed for homeowners, small businesses, government entities, child care facilities and educational facilities.

This proposed bill provides the DEP with the ability to mandate presumptive remedies and disapprove proposed remedies for the following category of sites: educational facilities, child care facilities, residential developments. The bill also proposes to prohibit the development of these uses on landfills that require leachate or methane collection systems.

The proposed bill also affirmatively states that Spill Act responsible parties have an obligation to remediate their discharges, outlines the requirements for DEP oversight, and provides the DEP with the ability to establish mandatory timeframes for all phases of remediation. As the DEP will no longer be issuing NFAs, the bill adds language related to the issuance of RAOs by an LSP to various sections of multiple remediation statutes. It also eliminates the DEP's requirement to issue a covenant not to sue. The bill also changes the statute of limitations (SOL) for natural resource damages to make it consistent with that for cost recovery and begins the SOL at the issuance of the RAO versus the completion of a remedial investigation. The bill updates various sections of other remediation statutes that contain requirements that are outdated, including requiring the DEP to maintain an electronic database of all sites, cases and areas of concern that the DEP has knowledge of and making available internet-based reports for the general public.

The DEP is proposing changes to the underground storage tank certification program for regulated UST's. The category for subsurface evaluator for corrective action on regulated UST systems is being terminated. In lieu of subsurface evaluators for regulated tanks, license site professionals will be licensed to perform corrective action on regulated tanks. Certified subsurface evaluators can continue to perform work on home heating oil tanks.

The DEP is adding language to be consistent with the federal regulated tank program and compliant with the energy policy act of 2005 specifically the Federal Underground Storage Tank Compliance Act. The referenced change will require new tanks being installed to comply with secondary containment and interstitial monitoring due to the proximity of the tanks to a water distribution system, which include the piping and any associated connections for the system. 95% of new UST systems installed over the past several years are secondarily contained with interstitial monitoring.

The proposed bill includes language related to the financial responsibility requirement to ensure there is sufficient funding for the remediation of discharges from a regulated UST systems. The language will require a UST owners or operators to establish a remediation-funding source for the costs of constructing a remedial action not covered by the existing financial assurance responsibility requirements. This may apply to old tank fields not covered by the current financial requirements.

The proposed bill would add a new section to the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 to -21, that would preclude the award of a grant from the remediation fund, or financial assistance from the remediation fund where financial assistance is in default and is uncollectible, to an owner or operator of an industrial establishment, person, municipality, county, or redevelopment entity authorized to exercise redevelopment powers pursuant to section 4 of P.L.1992, c. 79 (C.40A:12A-4) that at any time relinquished or waived a right to recover remediation costs against an insurance carrier, or a discharger or other person liable for the discharge pursuant to subsection c. of section 8 of the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11g.c., or the common law. The proposed bill also would, amend NJSA 58:10B-8(a)(4) to comport its provisions with those of the new section.

Lastly, the bill includes a provision to allow the DEP to issue permits necessary for the operation and maintenance of remedial actions, and for the biennial certifications of remedial actions, and to require any person who is responsible for the operation and maintenance of remedial action or for the submission of biennial certifications to obtain a permit.